



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 143 OF 2006**

**DAQARE TRANSPORTER LTD ..... PLAINTIFF/APPLICANT**

**VERSUS**

**CHEVRON KENYA LTD.....1ST DEFENDANT/RESPONDENT**

**CALTEX OIL(UGANDA) LTD ..... 2ND DEFENDANT/RESPONDENT**

**RULING**

By the Notice of Motion dated 1st March, 2013 the Defendants/Applicants seek orders as follows:-

1. That the mandate of the arbitral Tribunal

composed of **Mr. E.T. Gaturu, Rtd Mr. Justice Aaron Ringera** and retired **Mr. Justice Omondi Tunya** in the dispute between the parties herein arising from the **Road Carriage Agreement** dated 20th September, 2004 be terminated forthwith.

2. That the reference of the dispute herein to arbitration be set aside and or terminated.

3. That the plaintiff's suit against the defendants be dismissed for want of prosecution.

4. That the costs of this application and the entire suit and the arbitration be awarded to the defendants.

The gist of the application as can be discerned from the grounds thereof as well as the supporting affidavit sworn by Boniface Abala whereas the applicants and the respondents recorded a consent before this court that this matter go for arbitration and subsequently on 25th February, 2008 consented that the arbitral tribunal hears the matter for 90 days which period was subsequently; extended by consent of the parties the respondent has since 28th September, 2011 neglected to accede to the extension of the tribunal's jurisdiction to enable it to carry out its mandate. Further that the respondent's delay in settling its 50% deposit of the arbitral tribunal's fees has greatly delayed the arbitration thereby unduly prejudicing the applicant and as the arbitral tribunal has indicated that they do not have the requisite jurisdiction to terminate the proceedings in the absence of an extension of their mandate it is fair, just and in the interest of the expeditious disposal of this claim that their mandate be terminated and the suit herein be dismissed forthwith.

In his submissions counsel for the applicants has reiterated that the Respondent has not taken any step with a view to prosecuting this suit since 30th December 2010 a period of 2 years and 10 months, that the mandate of the tribunal expired on 30th December, 2010 before the proceedings were concluded and subsequent to this expiry the respondent has not taken any steps to extend the mandate to date, despite being prompted by the appellant's advocate. He submits that the respondent has not advanced any proper reasons for this failure and when the applicants moved the tribunal to terminate the proceedings the

tribunal said it had no jurisdiction to give substantive directions hence this application. He submits that the respondent is clearly not interested in pursuing its claim as is also evidenced by its failure to pay the arbitrator's fees. He contends it was not until this application was filed that the respondent fully settled its portion of the tribunals fees deposit, placing reliance on several authorities and submitting that it is the duty of the plaintiff to prosecute his case and not the defendant's, and that the delay herein is inordinate and in breach of the overriding objection of the civil procedure Act he beseeches this court to allow the application.

The application is vehemently opposed. The replying affidavit is sworn by Abdi Abshir Warsame that Managing Director of the Respondent company. In it he concedes that this suit was filed in 2006 and that parties referred the same to arbitration by a consent recorded on 20th Septemebr, 2004. He further concedes that the arbitration was to be heard and determined within 90 days of the appointment of the umpire. He either deposes that it took while before the arbitrators called the first meeting to set the arbitral proceedings on motion. He deposes that the expectation of all the parties was that the arbitral proceedings would proceed with exceptional dispatch and that the applicants having allowed the provisions of the arbitration Act to apply to these proceedings they waived the right to object to such non compliance. He disputes that there has been delay in settling the arbitrator's fees and contends that that is now settled. As for the extension of the tribunals` jurisdiction he deposes that it would be futile to do so yet the applicants have not put their proceedings in order. He contends that contrary to the applicant's allegation the plaintiff/respondent has been diligent in prosecuting this case both in the High Court and the Tribunal. He therefore contends that this application is bad in law and is intended to deny him of the right to be heard. That moreover the application itself offends the overriding objective. He urges this court to reject the application. These depositions are reiterated in the submissions of the advocate for the respondent. He has submitted that the application is misconceived and urged this court to dismiss it. Citing the court of appeal decisions in **Salkas contractor ltd V. Kenya Petroleum Refineries ( Msa) No. 250 of 2003(UR)** and **Ivita V. Kejumbu(1984) KLR 441** he states that no prejudice has been demonstrated by the applicants to warrant the dismissal of this case for want of prosecution. He attributes the delay to the failure of the advocate of the applicants to supply documents to them and has annexed correspondences to that effect. He has asked this court to revoke the overriding objective and to extend the jurisdiction of the arbitrators and contends that a ruling in favour of sustaining the suit will be well in line with the overriding objective and do justice to the parties.

It is indeed correct that the duty to prosecute the case lies with the plaintiff. Whereas the plaintiff in this case shifts the delay in so doing to the defendants/applicants it is discernible even from its own replying affidavit that its fault in occasioning the delay is greater. For one it took an inordinately long time to settle its part of the arbitrators fees and secondly it has neglected to consent to the extension of the arbitrator's jurisdiction despite being prompted to do so severally. Contrary to the submissions by Wasuna& Co. advocates the application before me is not misconceived and neither is it made in bad faith. As stated by **Dickson J in Vilani V. Patel & others ( 1969) E.A. 340:**

**“It is only too trite to say that as in every suit,**

**it is the plaintiff who is in pursuit of a remedy**

**that he should take all the necessary steps at his**

**disposal to achieve an expeditious determination**

**of his claim. He should not be guilty of laches.**

**On the other hand when he fails to bring his claim**

**to a speedy concussion it is my view that a defendant**

**ought to invoke the process of the court towards that**

**end as soon as it is convenient by either applying**

**for its dismissal or settling down the suit for**

**hearing”**

The applicants are clearly within their right to bring this application. However, not every application or dismissal for want of prosecution shall be allowed. As held in **Ivita V. Kyumbu(1984) KLR 4444** the court must consider “whether the delay is prolonged and inexcusable and if it is whether justice can be done despite the delay” the court will also consider whether the defendants are likely to be seriously prejudiced by the delay- see **Salkas contractors ltd v. Kenya Petroleum Refineries (Msa) C/App NO. 250 of 2003 (UR)** where Allan V. sir Alfred Mc Alpine and sons ltd (1968)/**ALLER 543 US** cited with approval. Applying those principles to the instant case it is my finding that whereas the delay is prolonged and inexcusable justice can still be done to the parties. The applicants have a part from alleging that the delay has unduly prejudiced them not demonstrated the prejudice they are likely to suffer. They have not for instance stated that they can no longer trace their witnesses or that it is impossible to have a fair trial. Accordingly the application is dismissed but with order that the plaintiff/respondent shall within sixty(60) days of this ruling take steps to move either the tribunal or this court with a view of having it set down for hearing. She shall also bear the costs of this application. It is so ordered.

**E.N. MAINA**

**JUDGE**

**Signed, dated and delivered in Kisumu this 19th day of March, 2015**

**In the presence of:**

Miss Olang for plaintiff/applicant

No appearance for respondent

Court clerk: Moses Okumu